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STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Petitioner/Appellee,

v.

SC # 154779
COA #325730
LCN #14-08324-FC

CARL RENE BRUNER II
Defendant-Appellant,

_____/

DEFENDANT-APPELLANT CARL RENE BRUNER II's SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

LAW OFFICES OF DAVID L. MOFFITT
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Attorney for Defendant-Appellant Carl Rene Bruner II

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Defendant-Appellant answers: "Yes."

A.

HAS THE HARMLESS ERROR DEFENSE HAS BEEN ABANDONED BY THE STATE WHEN IT NEVER WAS PROPERLY PRESENTED IN EITHER OF THE TWO QUESTIONS PRESENTED BELOW BY THE STATE AND WHERE THE STATE CITED ABSOLTELY NO AUTHORITY ASSERTING A HARMLESS ERROR DEFENSE?

Defendant-Appellant answers: "Yes."

B.

WHERE WESTLEY WEBB'S UNCONSTITUONALLY ADMITTED TESTIMONY WAS THE MOST POWERFULLY INCULPATORY EVIDENCE AGAINST DEFENDANT-APPELLANT CAN THE STATE CANNOT CARRY ITS BURDEN OF PROVING THAT THE CONSTITUTIONAL ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT?

Defendant-Appellant answers: "Yes."

STATEMENT OF FACTS

On December 4, 2014 Defendant-Appellant Carl Rene Bruner II was found guilty of one count each of first degree premeditated murder (FDPM), contrary to MCLA 750.316(a)(1), assault with the intent to murder (AWIM), contrary to MCLA 750.83, felon in possession of a firearm while ineligible (felon in possession), contrary to MCLA 750.224f, and possession of a firearm in the commission of a felony (felony firearm), contrary to MCLA 750.227b, following a ten day jury trial conducted in the Wayne County Circuit Court. (T 12-4-14 pp 3-4). The defendant was sentenced as a fourth habitual felony offender, contrary to MCLA 769.12. (T 1-5-15 p 5).

The defendant was tried together with co-defendant Michael Lawson before one jury. (T 11-19-14 p 4). The prosecution moved prior to trial to present a witness, Westley Webb, to testify to statements made by the co-defendant that would inculpate the defendant.

Defense counsel objected to the admission of the proffered testimony because the statement purportedly made by the co-defendant was not made against his own penal interest. He cited the holdings in *Bruton v United States,* 391 US 123; 88 SCt 1620; 20 LEd2d 476 (1968) and Crawford v Washington, 541 US 36; 124 SCt 1354;158 LEd2d 177 (2004) in support of his argument. (T 11-20-14 pp 6-8). The trial judge granted the prosecutor's motion to allow Wesley Webb to testify to the statement made by the co-defendant. (T 11-20-14 p 10).

The prosecution's theory of the defendant's guilt was that during the evening of June 19-20, 2012 the decedent, Marcel Jackson, and his partner, Wayne White, were working at the Pandemonium Club, located on E. Congress St. in Detroit, as extra security guards. (T 11-20-14 pp 175-176). The prosecutor told the jury that the defendant got into a physical altercation with a woman inside the Club for which he was ejected by security personnel. (T 11-20-14 p 175). He

stated that the defendant returned to the club in order to retrieve his keys and cell phone that he lost in the scuffle with the security guards. (T 11-20-14 p 176). He said that the defendant was given his keys and was told, at about 2:00 a.m., that he could reenter the club to look for his phone after he was searched. (T 11-20-14 p 177). He said that the defendant refused to be searched and he was not admitted inside. (T 11-20-14 p 178).

The prosecutor told the jury that the co-defendant, Michael Lawson drove a gray Dodge *Charger* around the block on which the Club was located and that the passenger in the vehicle was the defendant. (T 11-20-14 p 178), He stated that after the vehicle circled the block a couple of times the defendant was no longer inside of it. (T 11-20-14 p 179). He said that a number of security guards were outside when shots were fired from behind them. (T 11-20-14 p 180). He said that one of those shots hit Wayne White, who was wearing a bullet proof vest, in the back of the vest. (T 11-20-14 p 180). He said that another shot hit the decedent Jackson in the back and exited through his neck. (T 11-20-14 pp 180-181).

The prosecutor told the jury that Marcel Jackson died from the single through and through gunshot wound he sustained. (T 11-20-14 p 180). He said that Westley Webb would testify that the co-defendant told him that the defendant returned to the Club with a gun and was responsible for the shooting that took place there. (T 11-20-14 pp 184-186).

The Chief Wayne County medical Examiner, Carl Schmidt, M.D., (T 11-21-14 p 4), was qualified to testify as an expert in forensic pathology by stipulation. (T 11-21-14 p6). He stated that he performed an autopsy on the body of decedent Marcel Jackson on June 21, 2012. (T 11-21-14 p 8). He said that he sustained a single gunshot wound to the left side of his back near the mid line that exited through the left side of his neck, (T 11-21-14 p 14). that the bullet passed through the left lung in two places, (T 11-21-14 p 16), that the cause of death was a single

gunshot wound to the back, that the manner of death was a single gunshot wound to the back and that the manner of death was homicide. (T 11-21-14 p 20).

On cross examination Dr. Schmidt testified that no bullet was recovered at the autopsy because the wound was through and through. (T 11-21-14 p 21). He did not find evidence of close range firing on the body but did not examine the clothing because it was not delivered to his office with the body when it arrived from the hospital. (T 11-21-14 pp 21-22).

Mother of the decedent Carolyn Warrior testified that Marcel Jackson was the second of her three sons and that he was thirty-eight years of age at death. (T 11-21-14 pp 29-30). She knew the defendant from the neighborhood and that his nickname was "Box." (T 11-21-14 pp 30-31). She loved him like he was her own child. He had been giving her periodic payments of money for the benefit of her oldest son who was then in prison. (T 11-21-14 p 31). She spoke with him by phone often and saw him on June 7, 2012. (T 11-21-14 p 32).

Ms. Warrior testified that the defendant was driving a gray *Charger* when she saw him last. (T 11-21-14 p 34). He told her he obtained the car recently. (T 11-21-14 p 34). She went to Detroit Receiving Hospital on June 20, 2012 and identified her son's body. (T 11-21-14 pp 35-36). Her son had worked security and possessed a concealed pistol license (CPL). (T 11-21-14 pp 37-38). She said that she never heard from the defendant after the shooting. (T 11-21-14 p 38).

During cross examination she testified that the defendant was a friend of her oldest son and not a friend of Marcel's. (T 11-21-14 p 40). She stated that she could not reach the defendant on his phone when she called to tell him about her son's death because his phone was dead. (T 11-21-14 pp 40-42).

Officer Rick Fields of the Detroit Police Department (DPD) testified that on June 20, 2012 he was working as an evidence technician when he was dispatched to process a shooting scene. (T 11-21-14 pp 43-45). He received the call at about 4:45 a.m. and arrived at the scene at 5:30 a.m. (T 11-21-14 p 45). He was working with a partner, Officer Tom Smith, now retired. (T 11-21-14 p 46). (T 11-21-14 p 50). In an alley between the Club and another building, he found two ammunition magazines, a watch and a blood pool. (T 11-21-14 pp 51-52). Officer Fields testified that there were two cameras situated on St. Andrews Hall. (T 11-21-14 p 54). He found a second blood pool in that alley. (T 11-21-14 p 54). He located three nine millimeter shell casings in the alley. (T 11-21-14 p 72). found ten other casings near Stevens Restaurant on E. Congress. (T 11-21-14 p 73).

Off. Fields testified that Lt. Decker directed him to an area in the alley where a firearm had been seen. When he got there it was gone. (T 11-21-14 p 82). He searched between the buildings for bullets or fragments but did not find any. (T 11-21-14 p 95). Seven of the ten casings he found in front of the restaurant were on the sidewalk and three of them were in the parking lot next to the restaurant. (T 11-21-14 p 98). He did not recall seeing any people dressed in security uniforms in the area. (T 11-21-14 p 101).

Darnell Price testified that he knew Marcel Jackson because they worked together as security guards at the Pandemonium Club during June of 2012. (T 11-24-14 pp 4-5). He worked there during the night of June 19-20, 2012 and that at about 12:00 a.m. he was at the DJ booth on the second floor where he observed a male and a female get into an altercation. The male struck the female. (T 11-24-14 p 8). He identified the defendant as the male in question. (T 11-24-14 p 10).

Mr. Price testified that he took him to the ground and that other security officers removed him from the club. (T 11-24-14 p 10). He stated that he followed them downstairs and that the defendant found* with the security guards the entire time. (T 11-24-14 p 12). The defendant was loud and ready to fight. (T 11-24-14 pp 14-15). The defendant was thrown out the exit door of the club. (T 11-24-14 p 18).

Mr. Price testified that at about 2:30 a.m. the defendant approached him and asked to re-enter so that he could find his phone. (T 11-24-14 pp 23-25). He told the defendant he could do so after he was searched but the defendant refused to be searched and walked away. (T 11-24-14 pp 25-27). About a half hour later he saw the defendant circling the block in a *Charger,* and then, later, saw the *Charger* pass again without the defendant. (T 11-24-14 p 32). The *Charger* stopped in front of the Sweet Water Tavern (SWT) and that then shots were fired toward him from behind. (T 11-24-14 p 34). He said that he heard decedent Marcel Jackson say that he had been hit and that he and two other men pulled him into the alley. (T 11-24-14 p 38 and p 44).

Darnell Price testified that neither he or Mr. Jackson were armed. (T 11-24-14 pp 44-45). Mr. White drew his weapon but went for cover before doing so. (T 11-24-14 p 45). He was not sure how many shots were fired because his mind went blank after hearing the first one or two. (T 11-24-14 p 46). Other security officers tried to stop Marcel Jackson's bleeding. (T 11-24-14 pp 46-47). He said that both pools of blood in the alley came from Marcel Jackson because he was dragged from one position to another. (T 11-24-14 p 48-49). He identified the defendant at a photographic lineup about eight days after the incident. (T 11-24-14 pp 49-50). He never saw the defendant before that night. (T 11-24-14 p 51).

During cross examination he testified that the owner of the club left that night without paying four or five of the security guards. (T 11-24-14 pp 53-55). They were unhappy but were

told they would be paid the next day. (T 11-24-14 p 55. When the defendant refused to be searched he was wearing a pair of shorts and a white "wife beater" shirt and that he did not see a gun on the defendant's person. (T 11-24-14 p 65). Neither Marcel Jackson nor Wayne White were paid that night. (T 11-24-14 p72). He did not see a watch or any ammunition magazines in the alley by a green van. (T 11-24-14 p 75).

Darnell Price testified that none of the security personnel left the scene before the police arrived. (T 11-24-14 p 75). Wayne White went to the hospital with Marcel Jackson (T 11-24-14 p 76). He went to the hospital, returned to the scene and then gave a statement to the police. (T 11-24-14 pp 77-78). He acknowledged that he refused to speak with the co-defendant's attorney's investigator prior to the trial. (T 11-24-14 p 83). He said that he was working in this case with the prosecution. (T 11-24-14 p 83).

Darnell Price testified that the Pandemonium Club's policy was that outside security guards are to be armed. (T 11-24-14 p 88). He stated that he informed Marcel Jackson that he and the five men from Marcel Jackson's company would not be paid that night. (T 11-24-14 p 92). He said that there were four different rappers performing at the club that night and that each had their own security people. (T 11-24-14 p 93). He said that when he pulled Marcel Jackson into the alley Marcel Jackson had his firearm. (T 11-24-14 p 94). During redirect examination Darnell Price testified that when the defendant was put out to the club at about 12:30 a.m. he said, "I'll be back." (T 11-24-14 p 114).

Wayne White testified that he was a longtime friend of Marcel Jackson and that they were partners in the security business. (T 11-24-14 pp 117-118). He stated that he, Marcel Jackson, and two of their employees worked at the Club during the night of June 19-20, 2012 and that both he and Marcel Jackson were armed with their .45 caliber semi-automatic pistols. (T

11-24-14 p 121). He said that he observed the ejection of a person who had been near the DJ booth at about 12:30 a.m. (T 11-24-14 p 122).

Wayne White testified that at about 2:00 a.m. he and Marcel Jackson were at the exit door when the defendant came up and demanded the return of his phone. (T 11-24-14 pp 122-123). The defendant was upset and hostile and refused to be searched in order to re-enter the club. (T 11-24-14 pp 125-126). Later, he saw the defendant across the street in front of the SWT on his phone. (T 11-24-14 p 130). He said that a gray *Charger* stopped, the defendant got into the passenger seat and the car drove off. (T 11-24-14 p 131).

Wayne White testified that a few minutes later the *Charger* came down the street again while he, Marcel Jackson, and other security guards were on the sidewalk between the two doors of the club. (T 11-24-14 pp 133-134). The defendant was in the passenger seat and that the co-defendant was driving the *Charger*. (T 11-24-14 p 135).

Wayne White testified that he saw the *Charger* drive past him three times and that on the third occasion the defendant was no longer in it. (T 11-24-14 p 136). He and Marcel Jackson had their full attention on the vehicle after the third pass was made and that they both pulled their weapons. (T 11-24-14 pp 139-141). The *Charger* stopped in front of the SWT and the co-defendant got out while on his phone. (T 11-24-14 pp 144-145). He said that shots were then fired toward them from behind. (T 11-24-14 p 145).

Wayne White testified that he heard the first shot whistle past him and felt the second shot hit him in the back. (T 11-24-14 p 146). He took five or six steps into the alley toward the van and that Marcel Jackson did the same thing. (T 11-24-14 pp 146-147). He moved toward the van for cover and then heard Marcel Jackson say that he was hit. (T 11-24-14 pp 151-152). He

saw him fall and pulled him back into the alley. (T 11-24-14 pp 152-153). Neither he nor Marcel Jackson returned fire. (T 11-24-14 p 155).

Wayne White testified that the EMS arrived within five minutes and he was taken to the hospital. (T 11-24-14 p 156). He also went to the hospital and that he had his gun with him. (T 11-24-14 pp 156-157). There was a bullet lodged in the center of the back of the bullet proof vest he was wearing at the time of the shooting. (T 11-24-14 pp 157-158). Marcel Jackson died at the hospital one or two hours later. (T 11-24-14 p 158). He returned to the scene where he gave a verbal statement to the investigating officers. (T 11-24-14 pp 159-161). He gave a written statement later. (T 11-24-14 p 161). He identified both the defendant and the co-defendant in photographic lineups. (T 11-24-14 pp 162-163).

During cross examination Wayne White testified that he and his crew actually were paid during the night of this incident. (T 11-25-14 p 50). He gave a physical description of the man who approached him about having his phone returned, saying that he was five foot six inches or five foot seven inches tall. (T 11-25-14 p 68). When the defendant stood up at defense counsel's request Wayne White acknowledged that he was considerably taller than five foot six inches or five foot seven inches tall. (T 11-25-14 p 68). At sentencing the defendant stated that he was six foot two inches tall. (T 1-5-15 p 12).

Wayne White testified that the security personnel at the hospital put his gun in the vault there and that he left it in the vault when he returned to the Club. (T 11-25-14 p 78). He was impeached with his preliminary examination testimony in which he stated that he had his firearm with him when he returned to the club from the hospital. (T 11-25-14 pp 79-80). He stated that he did not recall hearing Dennis Smith tell him not to pay any attention to the defendant who was across the street at the SWT. (T 11-25-14 p 85).

Officer Dale Hopkins of the DPD testified that on June 20, 2012 he and his partner, Officer Alejandro Vela, were working the midnight shift in a fully marked patrol vehicle when they responded to a shooting complaint at 415 E. Congress in Detroit. (T 11-24-14 pp 164-166). He stated that they were the first officers on the scene and that it was very chaotic with about twenty men in between the Pandemonium Club and St. Andrews Hall. (T 11-24-14 p 167). He saw the victim lying on the ground holding the left side of his neck and that he could see blood coming from around his hands. (T 11-24-14 pp 168-169). He saw a .45 caliber semi-automatic pistol lying on the ground next to the victim. (T 11-24-14 pp 170-172). The EMS arrived and took the victim away in an ambulance. (T 11-24-14 pp 173-175).

Officer Hopkins testified that after he helped to put the victim in the ambulance he noted that the security men in the alley had gone away in different directions and that he had to run them down to try to find out what had happened. (T 11-24-14 p 175). He stated that he was able to get the names of both of the people who had been shot and of some of the witnesses. (T 11-24-14 pp 176-177). Later, he noticed that the pistol was gone. (T 11-24-14 p 178). He was disciplined because that occurred. (T 11-24-14 p 178). He said that the security staff members were on the scene but that he did not know where the gun went. (T 11-24-14 p 178).

During cross examination Officer Hopkins testified that he did not check any of the security people for weapons. (T 11-24-14 p 188). He did not notice that the gun was missing until about one and one half hours after he arrived when he was walking the evidence technicians through the scene. (T 11-24-14 pp 190-191). saw some shell casings near the van in the alley. (T 11-24-14 pp 191-192). He also saw shell casings closer to the street and in the sidewalk area. (T 11-24-14 p 192). He did not recall seeing any ammunition magazines or a watch. (T 11-24-14 p 193).

Officer Alejandro Vela of the DPD testified that during the early morning of June 20, 2012 he and his partner, Officer Hopkins, responded to 415 E. Congress where he saw a .45 caliber semi-automatic handgun that later disappeared. (T 11-24-14 p 203). It was next to the wall of St. Andrews Hall. (T 11-24-14 p 204). He looked at it periodically but then noticed that it was gone when the evidence technicians arrived on the scene. (T 11-24-14 p 204).

Dennis Smith testified that he was the security manager at the Club and that he was working during the night of June 19-20, 2012 while a big event was presented there. (T 11-25-14 p 5-6). He had a staff of between ten and fifteen security people but that when there is a big event he hired extra security people. (T 11-25-14 p 7). Between 12:00 a.m. and 12:30 a.m. he saw a disturbance at the DJ booth during which a man smacked a woman on the backside and she slapped him in return. (T 11-25-14 p 8). The man then punched the woman in the face two times with a closed fist. (T 11-25-14 pp 9-10). Several security guards grabbed him and that he and they took him outside of the club. (T 11-25-14 p 10). The man was upset and that about five minutes later he returned and asked for his keys. (T 11-25-14 pp 11-12).

Dennis Smith testified that he found keys to a Dodge product and that the man told him his car was a *Charger*. (T 11-25-14 pp 13-14). He gave the man the keys and saw him again at about 1:00 a.m. standing in front of the SWT. (T 11-25-14 pp 14-15). Two DPD cars were parked in front of the club that night at his request. (T 11-25-14 p 16). He noticed the man was still standing near the SWT after closing time, 2:15 a.m. (T 11-25-14 p 17). At about 1:00 a.m. a different man approached him and asked to retrieve a cell phone. (T 11-25-14 p 18). He checked for the phone, obtained it and gave it to the man. (T 11-25-14 p 19). The co-defendant was the man to whom he gave the phone. (T 11-25-14 pp 19-20). He gave the car keys to the defendant. (T 11-25-14 p 20).

Dennis Smith testified that he left the club at 2:30 a.m. and that the two DPD cars left the club before he did. (T 11-25-14 p 21). The next day the cleanup crew turned in another phone which he gave to the police. (T 11-25-14 p 22). He identified the defendant and the co-defendant in photographic lineups that he was shown on June 21, 2012. (T 11-25-14 pp 25-27).

During cross examination he testified that he saw the defendant standing alone by a pole near the SWT when he left for home at 2:30 a.m. (T 11-25-14 pp 37-38). The club has security cameras at each door both inside and outside but that no one from the DPD approached him and requested any surveillance videos. (T 11-25-14 p 40).He paid all of the outside security personnel, through their boss, before he left for home that night. (T 11-25-14 p 42). He knew both White and Jackson and that they were working for another company whose boss he paid. (T 11-25-14 p 43). He denied that he ever told the police that he left the club at 3:20 a.m. or 3:30 a.m. (T 11-25-14 p 44).

During redirect examination he testified that he was at home in bed when he was informed, at about 4:00 a.m., that a shooting had occurred at the club. (T 11-25-14 pp 45-46). He went to the front entrance door of the club approximately every twenty minutes in order to pick up the money being collected from the entering patrons. (T 11-25-14 p 47). He saw the defendant leaning on the pole in front of the SWT every time he went to the front door. (T 11-25-14 p 47). He did not pay any attention to the co-defendant because he was not involved in the altercation that occurred near the DJ booth. (T 11-25-14 p 47).

Deandre Mack testified that he was employed by Underground Security and that he worked at the Pandemonium Club as a security guard for about three years. (T 11-25-14 pp 110-111). He worked at the club during the night of June 19-20, 2012 as an inside security supervisor. (T 11-25-14 p 111). He knew Marcel Jackson which whom he had worked a few

times at the club. (T 11-25-14 p 113). He did not participate in the ejection of the defendant and was not aware of it when it occurred. (T 11-25-14 p 113).

He testified that the club closed at about 2:45 a.m., which was later than usual, and that he observed an altercation outside at bout that time in which a man said, "You are going to get yours." (T 11-25-14 p 114). He was talking with Marcel Jackson, Wayne White, and other security people outside at about 3:10 a.m. when he saw a *Charger* with no license plate driving by slowly on E. Congress. (T 11-25-14 pp 119-121). saw the vehicle drive by a second time, park in front of the SWT and a man exit to urinate. (T 11-25-14 pp 123-127).

Deandre Mack testified that the driver was a dark skinned black male wearing a blue jogging suit and that he was six foot two inches or six foot three inches tall. (T 11-25-14 p 129). His memory was refreshed with his statement to police in which he said the man was five foot eight inches or five foot nine inches tall and that he wore a blue shirt. (T 11-25-14 p 131). He then heard gunshots coming from the direction of Beaubien St. and ran. (T 11-25-14 p 132). He could feel the shots go by and that he ran deep into the alley. (T 11-25-14 p 133). He was not sure if that fire was returned and that he heard five gunshots. (T 11-25-14 p 34).

He testified that he could not see the passenger clearly. (T 11-25-14 p 135). He called 911 and he stayed at the scene. (T 11-25-14 p 136). He was shown a photographic lineup eight days later and he identified both the defendant and the co-defendant. (T 11-25-14 pp 149-141). He saw the defendant earlier that night when he was ejected from club. (T 11-25-14 p 140). He said that he saw the co-defendant driving the *Charger*. (T 11-25-14 p 140).

During cross examination he testified that he did not hear the man actually say, "You are going to get yours" but that he was reading his lips. (T 11-25-14 p 144). When he stated that he did not know if the defendant was wearing jeans he was impeached with his statement to the

police in which he said that he was wearing blue jeans and a white shirt. (T 11-25-14 p 144). He said that five or six people were ejected from the club that night and that the light skinned black male was thrown out at about 12:00 a.m. (T 11-25-14 p 146). He said that when the shots were fired he did not see anyone on Beaubien St. (T 11-25-14 p 151).

He testified that the shooter was near a building about twenty feet away from him as he stood by the alley. (T 11-25-14 p 152). The shooter was near the bar and pub. (T 11-25-14 p 154). When he ran into the alley there was more than one car there. (T 11-25-14 p 154). Other security personnel were in the alley as well. (T 11-25-14 p 155). It took twenty-five minutes before the ambulance arrived after he called 911. (T 11-25-14 p 156). Some of the people left before the police and the ambulance arrived. (T 11-25-14 p 156). He said that there were about five people in the alley when the police arrived. (T 11-25-14 p 156).

Deandre Mack testified that while he wrote "Shooter" on the defendant's photographic lineup sheet he did not see the shooter and he did not know who the shooter was. (T 11-25-14 p 157). He acknowledged that he refused to speak with the co-defendant's attorney's investigator because he would not talk to anyone who was working for the "bad guys". (T 11-25-14 p 158). While he described a man thrown out of the club to be six foot two wearing a white shirt and blue jeans the man he saw in the video was wearing black shorts and a T-shirt. (T 11-25-14 pp 161-162). He saw the man in jeans wearing a white shirt return inside the club after being thrown out. (T 11-25-14 p 164). Bryan Huff was parked outside on the street at about 3:00 a.m. waiting for him to be finished with work. (T 11-25-14 p 165). He thought the shooter stopped firing when Mr. White returned fire. (T 11-25-14 p 166).

Terry Lopez testified she was thirty-nine years of age and had a romantic relationship with the defendant for four or five months during 2012 after meeting him in January of that year.

(T 11-25-14 pp 170-171). They purchased a Dodge *Charger* together in May of 2012 as fifty percent partners. (T 11-25-14 p 173). Both of their names were on the loan and on the vehicle registration. (T 11-25-14 p 173). While she drove it three or four times the defendant usually had the vehicle. (T 11-25-14 p 175). The car was green in color. (T 11-25-14 p 175).

Terry Lopez testified that she communicated with the defendant during June of 2012 by cell phone and text and that she had planned to meet with him during the night of June 19, 2012. (T 11-25-14 p 177). They exchanged twelve calls and texts, got into an argument and did not get together that night. (T 11-25-14 pp 177-178). The next communication she had with him was one year later. (T 11-25-14 p 178).

Terry Lopez was impeached with her prior statement to Det. Foster that the vehicle was dark silver in color and that she only drove it one time. (T 11-25-14 pp 178-183). She stated that she did not know the co-defendant. (T 11-25-14 p 186). She never heard the defendant called by the nickname "Box". (T 11-25-14 p 188).

Det. Sgt. Dean Molnar of the Michigan State Police's Metropolitan Detroit Forensic Laboratory was qualified to testify as an expert in firearms and tool mark identification by stipulation. (T 11-26-14 pp 4-5). He testified that he examined the thirteen shell casings recovered in this case and that all of them were nine millimeter "Lugar" casings. (T 11-26-14 pp 12-15). Three of the casings were ejected from one gun and the other ten were ejected from a different gun. (T 11-26-14 p 17). The bullet recovered from the bullet proof vest was in the .38 caliber/nine millimeter class and that it was consistent with the casings he examined. (T 11-26-14 p 25). He could not compare the bullet to the casings without a firearm. (T 11-26-14 p 26).

During cross examination Sgt. Molnar testified that he did not receive any ammunition magazines to examine. (T 11-26-14 p 28). He did not examine the bullet proof vest for gunfire

residue or close range firing. (T 11-26-14 p 31). On redirect examination he testified that he did not notice any gunfire stipling on the vest. (T 11-26-14 p 32).

The prosecutor informed the trial court that he was unable to locate Westley Webb in spite of the efforts of the officer in charge made to do so during the past several weeks. (T 12-1-14 pp 4-5). He requested that he be allowed to read his preliminary examination testimony before the jury. (T 12-1-14 p 6). Defense counsel objected. (T 12-1-14 p 7). He stated that he had requested separate juries from before the beginning of the trial. (T 12-1-14 p 7). He had originally proposed that if the court would not allow separate juries that Westley Webb should not be allowed to testify to the co-defendant's statement. (T 12-1-14 p 7).

Defense counsel then argued that the statement purportedly made by the co-defendant to Westley Webb, which inculpated the defendant, was not at all against the co-defendant's penal interest. (T 12-1-14 pp 7-8). He stated that the assistant prosecutor's proposal to redact the defendant's name from Westley Webb's testimony would not cure the problem created by the assistant prosecutor's request. (T 12-1-14 p 8). He said that the admission of the proffered evidence would lead the jury to impermissibly consider it in trying to judge the case against the defendant. (T 12-1-14 p 8).

The trial judge found that the prosecution had acted with due diligence to find Westley Webb who was clearly hiding. (T 12-1-14 p 11). He said, "So it's admissible under the circumstances. It is a declaration against penal (sic) interest and it is admissible." (T 12-1-14 p 12).

The preliminary examination testimony of Westley Webb was then read to the jury. (T 12-1-14 pp 16-30). Throughout the entire transcript the defendant's name was deleted and instead replaced with the work "Blank." (T 12-1-14 pp 16-30). In his testimony, Westley Webb

stated that Michael Lawson told him that Blank got out of the car before the shooting and that he possessed a gun. (T 12-1-14 pp 21-22). He said that after Blank got out of the car then, "[S]hots rung up." (T 12-1-14 p 22). He said that the club was on Congress and that after the shooting Blank told him that he had a ride home. (T 12-1-14 p 23).

Defense counsel was allowed to admit evidence, by stipulation, that Westley Webb received a beneficial plea bargain in his own case as a result of providing testimony against the defendants in this case. (T 12-1-14 p 30). Westley Webb had been allowed to withdraw the pleas of guilty he made in February of 2014 to, *inter alia*, one count of felony firearm. (T 12-1-14 pp 30-31). He ultimately pled guilty to crimes that did not require mandatory prison and received a sentence of three years of probation. (T 12-1-14 pp 30-31). The phone and text message records for the defendant during the period beginning on June 18, 2012 and ending on June 21, 2012 were admitted by stipulation. (T 12-1-14 p 32). The parties stipulated that the defendant was not eligible to possess a firearm on June 20, 2012. (T 12-1-14 p 32). The People rested upon the entry of those stipulations. (T 12-1-14 p 33).

The defendant did not testify or present any witnesses. (T 12-1-14 pp 33-34). The co-defendant did not testify. (T 12-1-14 p 72). He did call Bryan Huff who testified that he was parked outside of the Club to pick up his friend, Deandre Mack, at about 2:00 a.m. on the morning of June 20, 2012. (T 12-1-14 pp 53-55). He noticed a *Charger* with dark tinted windows parked at the corner in front of the SWT. (T 12-1-14 pp 54-55). He could not see anyone inside the vehicle because of the tinted windows. (T 12-1-14 p 56). He heard shots being fired and got down. (T 12-1-14 p 55).

Bryan Huff testified that he and the security people were at the scene until about 6:00 a.m. during which time the bouncers were trying to figure out who did the shooting. (T 12-1-14 pp 59-60).

The jury heard the arguments of counsel and the court's instructions on the law, and began deliberations at 12:20 p.m. on December 3, 2014. (T 12-1-14 p 91). Deliberations continued until 3:52 p.m. when it was excused for the day. (T 12-1-14 p 93). Deliberations resumed at 9:00 a.m. the following morning. (T 12-1-14 p 93). It returned the verdicts of guilty as charged against the defendant at 10:38 a.m. on December 4, 2014. (T 12-4-14 pp 3-4). It returned verdicts of guilty of the less serious charge, second degree murder, and guilty as charged of AWIM against the co-defendant. (T 12-4-14 p 4).

The Michigan Department of Corrections' Bureau of Probation (MDOC) conducted a presentence investigation in anticipation of the defendant's sentencing conducted on January 5, 2015. (T 1-5-15 p 3). A Presentence Investigation Report (PIR) was prepared as a part of that investigation. (T 1-5-15 p 3). The Basic Information Report (BIR), made a part of the PIR, stated the defendant's height at six foot two inches and his weight at 220 pounds. (See BIR, attached as Appellant's Appendix A).

Counsel for the parties agreed to corrections of the Sentencing Information Report (SIR) prepared pursuant to the defendant's conviction for one count of AWIM. (T 1-5-15 pp 4-5). Those corrections left him in the F-VI cell on the Class A felony grid with a minimum sentence range of from 270 months to 900 months for the defendant as a fourth habitual felony offender. (T 1-5-15 p 5).

The trial judge imposed a sentence of two years in prison for one count of felony firearm. (T 1-5-15 p 16), a consecutive sentence of natural life in prison without parole for pursuant to the

defendant's conviction for FDPM. (T 1-5-15 p 15). He then imposed a sentence of from 450 months to 900 months in prison pursuant to the defendant's conviction of AWIM. (T 1-5-15 p 16). He imposed a sentence of from forty months to sixty months pursuant to the defendant's conviction for felon in possession.

The trial judge ordered that the defendant's sentences for FDPM, AWIM and felon in possession would run concurrently but consecutive to the two year sentence for felony firearm. (T 1-5-15 p 16). Credit of 138 days for time served in jail prior to sentencing was granted against the felony firearm sentence. (T 1-5-15 p 16).

INTRODUCTION

This matter presents the perfect opportunity for this Honorable Court to finally "provide guidance to the lower courts on the framework for analyzing," *People v Radant,* 499 Mich 988 (2016) (McCormick, J., dissenting) a defendant's claim that his constitutional right to confrontation was violated despite the redaction of testimony and limiting instruction in light of the United States Supreme Court's decision in *Gray v Maryland,* 523 US 185 (1998). This Court has yet – despite the issuance of *Gray* almost 20 years ago – to squarely address this issue in light of *Gray.*[1] Where every federal Court of Appeal[2] and a large variety of state Supreme Courts[3] have addressed this issue in light of the United States Supreme Court's decision in *Gray*

[1] The case of *People v Gardette,* 461 Mich 862 (1999) is the only case from this Court which cites *Gray v Maryland,* 523 US 185 (1998) The Court did not squarely resolve the issue, but only remanded the matter to the Court of Appeals for resolution. The issue or precedent has thus never been addressed by this Court.

[2] *Foxworth v St. Amand,* 570 F3d 414, 430, 434-435 (1st Cir 2009); *United States v Taylor,* 745 F3d 15, 28-29 (2d Cir 2013); *Wash v Sec'y Pa Dep't of Law,* 801 F3d 160, 165-168 (3rd Cir 2015); *United States v Saraeum Min,* 704 F3d 314, 319-321 (4th Cir 2013); *United States v Hickman,* 151 F3d 446, 457-458 (5th Cir 1998); *Stanford v Parker,* 266 F3d 442, 456-457 (6th Cir 2001); *United States v Eskridge,* 164 F3d 1042,1044-1045 (7th Cir 1998); *United States v Coleman,* 349 F3d 1077, 1085-1087 (8th Cir 2003); *United States v Peterson,* 140 F3d 819, 821-822 (9th Cir 1998); *United States v Rahseparian,* 231 F3d 1267, 1276-1278 (10th Cir 2000); *United States v Schwartz,* 541 F3d 1331, 1349-1353 (11th Cir 2008); *United States v Straker,* 800 F3d 570, 595-601 (DC Cir 2015).

[3] *Jefferson v State,* 359 Ark 454, 468-470; 198 SW3d 527 (2004); *People v Burney,* 47 Cal 4th 203, 231-232; 212 P3d 639 (2009); *Davis v State,* 272 Ga 327, 331; 528 SE2d 800 (2000); *State v Leutfaimarry,* 585 NW2d 200, 205 (1998); *State v White,* 275 Kan 580, 593-595; 67 P3d 138 (2003); *Barth v Commonwealth,* 80 SW3d 390, 394-395

this Court should also address the issue and precedent here and now. Every level of courts, criminal defendants, county prosecutors, criminal trial and appellate practitioners within the State of Michigan all have eagerly awaited this Court's well-needed guidance on this issue and all will be well-served by a final resolution from this State's highest court.

Where Defendant-Appellant never had the prior opportunity to cross-examine Westley Webb the admission of his preliminary examination testimony at Defendant-Appellant's joint trial with Michael Lawson ("co-defendant Lawson") unquestionably violated Defendant-Appellant's constitutional right to confrontation, notwithstanding the redaction of that testimony and limiting instruction to the jury. The unconstitutional redaction in this case is materially indistinguishable from the constitutionally offensive redaction condemned by the Supreme Court in *Gray* where the word "blank" was merely substituted for the Defendant-Appellant's name. The clearly ineffective redaction of Defendant-Appellant's name miserably replaced with the obvious word "blank," "did 'not likely fool anyone,'" *Commonwealth v Markman,* 591 Pa 249, 277 (2007), especially where the prosecution's theory was consistently that "there [wer]e [only] two different people involved in two different ways," (Trial Transcript, hereinafter "T," 11-20-14, 187), namely Defendant-Appellant and co-defendant Lawson who sat directly next to each other at this joint trial.

The limiting instruction served absolutely no curative purpose at all where during its opening statement the prosecution gave a vivid summary of Westley Webb's expected testimony explicitly referencing Defendant-Appellant by name. (T 11-20-84, 194). The jury was instructed

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(2001); *State v Boucher,* 1998 ME 209, p15; 718 A2d 1092 (1998); *Commonwealth v Bacigalupo,* 455 Mass 485, 493; 918 NE2d 51 (2009); *Harris v State,* 861 So2d 1003, 1021-1023 (2003); *State v Blanche,* 696 NW2d 351, 367-368 (2005); *State v McLaughlin,* 205 NJ 185, 209-210; 14 A3d 720 (2009); *People v Pizarro,* 2017 NY Slip Op 04637 *3; 2017 WL 2491334 (2017); *State v Brewington,* 352 NC 489, 508-512; 532 SE2d 496 (2000); *Commonwealth v Markman,* 591 Pa 249, 275-278; 916 A2d 586 (2007); *State v Holden,* 382 SC 278, 285; 676 SE2d 690 (2009); *State v Fisher,* 185 Wn2d 836, 842-844; 374 P3d 1185 (2016).

to "expect" (T 184), to hear from Westley Webb and that he would "be clear and straight forward and tell" the jury about "a conversation [] he had with [co-defendant Lawson] a day or two after he shooting and Mr. Lawson tells Mr. Webb his friend that Mr. Lawson was saying how he was driving [Defendant-Appellant's] Charger and [Defendant-Appellant and co-defendant Lawson] went to the Pandemonium club." (T 185). The prosecutor revealed that Mr. Webb would testify that co-defendant Lawson confessed to Mr. Webb that "they had gone to the club and how [Defendant-Appellant] had been put out for getting into it with a girl." The jury was told that Mr. Webb was going to testify that Defendant-Appellant and co-defendant Lawson "came back they came back [Defendant-Appellant] had a gun." (T 185). The jury was told to expect to hear from Mr. Webb "How [co-defendant Lawson] drove [Defendant-Appellant] [with] a gun and that how [co-defendant Lawson] drove [Defendant-Appellant] and [co-defendant Lawson] let [Defendant-Appellant] out and [Defendant-Appellant] went to Sweet Water." The prosecutor made it clear to the jury that "Mr. Webb is telling you that Mr. Bruner came back with a gun involving got involved in a shooting." (T 186).

As the prosecutor declared:

> "[I] think the statement from Mr. Webb is very clear. He knew that Mr. Bruner had a gun and that he dropped him off right here in the corner and then he stops at Sweet Water."
>
> (T 188).

The State never properly submitted the question of harmless error to the court below by never including harmless error in its questions presented and never cited any applicable harmless error authority in its brief. The State has abandoned the issue of harmless error and should not be heard on this issue before this Court. *People v Mackle*, 241 Mich App 583, 604 n4 (2000)

Even if the State's abandonment of its harmless error defense is overlooked, the State as "the beneficiary of th[is] error [*cannot*] establish[] that it is harmless beyond a reasonable doubt." *People v Carines,* 460 Mich 750, 774 (1999) (citing *People v Anderson (After Remand),* 446 Mich 392 (1994). Without this constitutional violation "the 'minds of an average jury' would have found the prosecution's case 'significantly less persuasive' had the [testimony] of [Mr. Webb] been [constitutionally redacted]. *People v Banks,* 438 Mich 408, 431 (1991) (quoting *Schneble v Florida,* 405 US 427, 432 (1972). No single witness – aside from Westley Webb's uncross-examined testimony – actually put a gun in Defendant-Appellant's hands on the night in question. No matter how suggestive of a motive the evidence of Defendant-Appellant's unhappiness with allegedly being tossed out of the night club by security appeared, without the testimony from Wesley Webb putting a gun in Defendant-Appellant's hands there is a significant and reasonable probability that at least one juror would have harbored reasonable doubt in this case. The State cannot carry its burden of proving beyond a reasonable doubt that absent this clear constitutional violation that the jury would have reached the same decision.

This Court should grant leave to appeal, conclude that the facts of this case clearly contravened *Gray*, rule that the State abandoned any argument of harmless error, and ultimately hold that the constitutional violation here was not harmless beyond a reasonable doubt.

I.

WHERE DEFENDANT-APPELLANT NEVER HAD A PRIOR OPPORTUNITY TO CROSS-EXAMIINE WESTLEY WEBB BECAUSE HE ONLY TESTIFIED AT CO-DEFENDANT LAWSON'S PRELIMINARY EXAMINATION, THE ADMISSION OF WESTLEY WEBB'S PRELIMINARY EXAMINATION TESTIMONY AT THE JOINT TRIAL VIOLATED DEFENDANT-APPELLANT'S CONSTITUTIONAL RIGHT TO CONFRONTATION NOTWITHSTANDING THE

REDACTION AND LIMITING INSTRUCTION BECAUSE THE POWERFULLY INCRIMINATING TESTIMONY UNCONSTITUTIONALLY REPLACED DEFENDANT-APPELLANT'S NAME WITH AN OBVIOUS ALTERATION --THE WORD 'BLANK"-- AND PARTICULARLY WHERE THE JURY WAS ALREADY TOLD THAT THE REDACTED TESTIMONY SPECIFICALLY CONCERNED DEFENDANT-APPELLANT

Standard of Review

"Constitutional questions, such as these concerning the right to confront witnesses at trial, are reviewed de novo." *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006).

Discussion

This Court in *People v Liggett,* 378 Mich 706; 148 NW2d 784 (1967) made it clear:

> "Whenever defendants are jointly tried, it is of utmost importance that the rights of each defendant be carefully protected by the trial judge. No defendant should be convicted of the crime of another defendant."
>
> *Id* at 714.

The principle established by this Court in *Liggins, supra*, was violated in the case at bar, when Westley Webb's practically unredacted preliminary examination testimony was admitted in Defendant-Appellant's joint trial with co-defendant Lawson, where there was no prior opportunity for Defendant-Appellant to cross-examine Westley Webb.

There can be no dispute that Westley Webb's preliminary examination testimony was inadmissible under *Crawford v Washington*, 541 US 26 (2004).[4] The Confrontation Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right. . . to be confronted with the witnesses against him." *US Const Amend VI.* This right is

[4] The Court below held that "Because Webb's testimony at the preliminary examination was testimonial, for that testimony to be admissible at trial, the Sixth Amendment required: (1) that Webb was 'unavailable' and (2) that there was a prior opportunity for cross-examination." *People v Bruner II/Lawson,* unpublished per curiam opinion of the Court of Appeals dated October 11, 2016 (Docket Nos. 325730 & 326542) slip op at *9.

applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Pointer v Texas,* 380 US 400, 406 (1965). In *Crawford* the Supreme Court held that hearsay is testimonial and can be admitted against a criminal defendant only if the declarant is unavailable for trial and the defendant had a prior opportunity to cross-examine the declarant. *Id.* at 59. The Court in *Crawford* listed three "formulations of th[e] core class of testimonial statements,":

> "[(1)] "ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially," Brief for Petitioner 23; [(2)] "extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," White v. Illinois, 502 U. S. 346, 365 (1992) (Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment); [(3)] "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," Brief for National Association of Criminal Defense Lawyers et al. as Amici Curiae 3.

Id. at 51-52. The Court noted that "all share a common nucleus." *Id.* at 52. It also declared that testimony at a preliminary hearing, grand jury proceeding, or former trial and statements in police interrogations are testimonial under any definition, *id.* at 52, 68.

Since Westley Webb's preliminary examination testimony was the method used to introduce co-defendant Lawson's confession which significantly incriminated Defendant-Appellant the parameters of this case are controlled by three United States Supreme Court cases: *Bruton v United States,* 391 US 123 (1968); *Richardson v Marsh,* 481 US 200 (1987); and *Gray v Maryland,* 523 US 185 (1998).

In *Bruton*, a postal inspector testified at trial that one co-defendant, Evans, confessed to committing an armed robbery and had named his co-defendant Bruton as his accomplice. The

trial judge "instructed the jury that although Evans' confession was competent evidence against Evans it was inadmissible hearsay against petitioner and therefore had to be disregarded in determining petitioner's guilt or innocence." *Bruton*, 391 US at 125. The *Bruton* Court held that a criminal defendant is deprived of his constitutional right to confrontation when a non-testifying co-defendant's confession naming him as a participant in the crime is introduced at their joint trial, regardless of whether the judge has given the jury a limiting instruction to consider the confession only with regards to the confessor, 391 US at 126. In short, the Court "recognized a narrow exception" to the presumption that a jury will follow the instructions of the trial court, *Richardson,* 481 US at 207, noting that under these circumstances "the risk that a jury will not or cannot, follow the instructions is so great and consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Bruton,* 391 US at 135.

Next, in *Richardson*, one non-testifying co-defendant's confession to an assault and murder that was given to police was admitted at the co-defendants' joint trial. The confession was redacted to omit all reference to Clarissa Marsh, one of the other co-defendants being tried at that time. *Richardson,* 481 US at 203. Further, the jury was given a limiting instruction to not use the confession in any way against the other co-defendants, including Marsh. *Id.* at 205. Marsh objected to the confession's admission under *Bruton* as a violation of her right to confrontation. The *Richardson* Court held that "the Confrontation Clause is not violated by the admission of a non-testifying co-defendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence." *Id* at 211. When a confession has been completely sanitized in this fashion, the *Richardson* Court explained, "a judge's instruction may well be successful" and

"there does not exist the overwhelming probability" that a jury will be unable to disregard the incriminating statement. *Id.* at 208.

Most recently came *Gray*, where, a non-testifying co-defendant's confession to beating a person to death was admitted after it was redacted by substituting a blank space or the word "deleted" for the defendant's names. *Gray,* 523 US at 188. When the confession was read in court, the detective who read it into evidence said the words "deleted" or "deletion" whenever either of the co-defendants' names appeared. *Id.* One of the co-defendants challenged the admission of the confession into evidence, despite the judge giving a limiting instruction. The *Gray* Court took the opportunity to delineate the boundaries of the exception to the constitutional right to confrontation. It wrote that in *Gray*, "unlike Richardson's redacted confession, this confession refers directly to the 'existence' of the non-confessing defendant." *Id.* at 192. It held that, redaction that replaces a defendant's name with an obvious indication of deletion . . . still falls within Bruton's protective rule . . . Redactions that simply replace a name with an obvious blank space . . . or other similarly obvious indications of alteration, however, leave statements that, considered as a class, so closely resemble Bruton's unredacted statements that, in our view, the law must require the same result. *Id.* This is because "the obvious deletion may well call the jurors' attention specially to the removed name [and] . . . [is] directly accusatory." *Id* at 193-94. Justice Scalia's is dissent noted that "[t]oday the Court . . . extends *Bruton* to confessions that have been redacted to delete the defendant's name." *Id* at 200.

Taken together, the current state of the law is that there is a confrontation clause violation when a non-testifying co-defendant's confession is introduced that names another co-defendant, *Bruton,* 391 US at 126, or that refers directly to the existence of the co-defendant in a manner that is directly accusatory, *Gray*, 523 US at 193-94. That is because such statements present a

"substantial risk that the jury, despite instructions to the contrary, [will] look[] to the incriminating extrajudicial statements in determining [the defendant's] guilt." *Bruton*, 391 US at 126.

This case is easy. In direct contradiction of the rules clearly established in the *Bruton/Richardson/Gray* trilogy no reasonable viewer of the law under with the facts of this case would conclude that there was no error in the case at bar. For instance, *Gray* expressly instructs that the redaction cannot use descriptive terms, 523 US at 195, cannot replace the defendant's name with any kind of symbol, *id.* at 192, and cannot replace the defendant's name with an obvious indication of deletion, *id.* at 192. The obviously incriminating testimony in the case at bar obviously replaced Defendant-Appellant's name with the word "blank."

First, the record shows that Defendant-Appellant never had a prior opportunity to cross-examine Westley Webb because he only testified at the proceeding of co-defendant Lawson:

> MR. PRASAD: (Assistant Prosecuting Attorney)
> Thank you, Judge.
>
> Judge, the next witness that the People intend to call was a gentleman by name of Westley Webb. Mr. Webb was a witness in this case that testified at the exam against Mr. Lawson only.

(T 12-1-14, 4).

The State then declared that they could not find Westley Webb to call him at trial. (5-6). The State sought to admit a transcript of Westley Webb's preliminary examination testimony:

> BY MR. PRASAD:
>
> And secondly we are asking to admit his examination transcript testimony. Now I want to be very clear about this judge.
>
> Because of these two defendant's two separate examinations Mr. Webb only testified against Mr. Lawson. And

> according to the law I'm correct in suggesting that we're only asking to allow it against Mr. Lawson.
>
> (T 12-1-14, 4).

While the State correctly stated the law as to the preliminary examination testimony not being admissible against Defendant-Appellant since he never had a prior opportunity to cross-examine Westley Webb, the State contravened the clearly established holding of *Gray, supra,* by claiming it would be constitutionally sufficient to merely replace Defendant-Appellant's name with "the word blank":

> MR. PRASAD:
>
> "[H]owever, if the Court wants me to redact it what I'm suggesting to the Court and to defense counsel is that in the place where transcript testimony where he mentions Box by name which is what he called him which is consistent throughout the trial, Mr. Bruner's nickname I'm going to instruct Ms. Matthews *to say the word blank so as not to identify the defendant it that's what the Court instructs us to do.*
>
> THE COURT: Okay."
>
> (T 12-1-14, 6-7).

Defendant-Appellant rebuffed the State's suggestion that simple redaction by replacing Defendant-Appellant's name with the word "blank" was sufficient:

> MR. SCHLAFF (Defense Counsel):
>
> "Furthermore your Honor I'm sorry the Prosecutor is saying to cure all of this by a redaction and allowing the statement to come in.
>
> And it's my position that they jury would – is receiving information and it could still impermissibly consider this in trying to judge the innocence or guilt of my client.
>
> And that is against a whole slue (sic) of cases including the People versus Banks at 438 Michigan 408. Where although they're

> talking about a confession and um they're saying that redaction alone is not sufficient because it could create a substantial risk that the jury would impermissible consider the statement and in trying to make a decision.
>
> So for all of those reasons your Honor I think that the court should rule that the prosecutor not proceed in this matter period.

(T 12-1-14, 8-9).

The trial court judge rejected Defendant-Appellant's objection to the mere redaction of Defendant-Appellant's name by using the obvious alteration of the word "blank" instead and clearly erroneously concluded that "[T]he defense was given an opportunity to cross examination of the witness which is required for the Court to even allow the transcript of the witness to be read at trial." Defendant-Appellant never had an opportunity to cross-examine Westley Webb, contrary to the trial court's conclusion. The trial court ultimately went on to rule that Westley Webb's preliminary examination transcript "is admissible and um if defense wants the names to be redacted the Court will order that." (T 12-1-14, 12).

The crudely redacted and constitutionally offensive preliminary examination testimony of Westley Webb was submitted to Defendant-Appellant's jury. Westley Webb's insufficiently redacted testimony did precisely what the prosecutor declared it would do which is:

> "[M]r. Webb is telling you that Mr. Bruner came back with a gun involving got involved in a shooting."
>
> (T 11-20-14, 186).

Westley Webb's testimony informed the jury that he knew co-defendant Lawson by his nickname "Lucky". (T12-1-14, 17). Mr. Webb admitted that he testified in exchange for favorable treatment from the State. (18-19). He then proceeded to explain that in June, 2012 he had a conversation with co-defendant Lawson about "a shooting incident that occurred in the city

of Detroit." The State had him elaborate which made direct reference to Defendant-Appellant as "blank":

BY MR. PRASAD:

Q: All right.

And what did Mr. Lucky tell you about this shooting situation?

A: He told me that the police was looking for him for an incident that happened at the club with him *and another guy got into it.*

Q: Do you know the *other guy's name?*

A: I just know him by **Blank.**

Q: Blank?

A: That's it; I don't really know him.

Q: That's his nickname?

A: I guess.

Q: Okay.

What did Lucky tell you happened?

A: He told me that the guy, **Blank** had got into it with his girl in the club, bouncers put him out, roughed him up. They left the club, rode around then rode around in the car a couple of times.

Q: When can say they, who you are talking about?

A: **Blank** and Lucky.

Q: **Blank** and Lucky.

And when you say rode around what you do mean (sic) by rode around?

A: He said they rode around.

Q: Okay.

A: And after that, he said that he let **Blank** out the car, he went and pulled in front however Sweet Walter Tavern and smoked a cigarette and while he was smoking a cigarette (sic) he heard shots then people started running, he got in the car and left.

* * *

Q: I'm sorry, when **Blank** –

A: -- I said Blank.

Q: **Blank** got out of the car?

A: Yeah, Lucky said **Blank** got out of the car.

Q: Okay.

Did that happen – did **Blank** getting out of the car happen before Lucky went do (sic) Sweet Water Tavern?

A: Yes.

Q: And what vehicle was – was Lucky driving?

A: **Blank's** vehicle.

Q: And do you know what kind of vehicle **Blank** had?

A: A charger.

* * *

Q: Do you know if Lucky ever said anything about **Blank** having a gun?

A: He said they had a gun with them when they, you know, in the car, so he didn't say that, you know, that **Blank** just took the gun.

* * *

BY MR. PRASAD:

Q: Do you remember being asked a question by Officer Foster did he see **Blank** with a gun? He referring to Lucky? Do you remember giving Officer Foster this answer, yes, because he told me **Blank** had a gun.

He said that they left and came back and that when he let **Blank** out of the car and the gun shot rung up. They were both in his car driving around until **Blank** got out? Do you remember giving those answers?

A: Yes, but I don't think it was worded exactly that way.

* * *

Q: About that night.

Okay.

Do you know if Lucky and **Blank** met up after the shooting?

A: No.

Q: You don't know, did Lucky say anything about that?

A: No, he just said that **Blank** told him he had a ride. He you know he was going to get a ride and he said he left.

Q: Do you know how did Lucky ever tell you whether or not he got in contact with **Blank** after the shooting?

A: He never told me.

(T 12-1-14, 19-23).

Almost two dozen times Defendant-Appellant was referenced as "Blank" within the powerfully incriminating testimony. As the prosecutor promised the jury during its opening statement:

BY MR. PRASAD:

> "[I] think the statement from Mr. Webb is very clear. He knew that Mr. Bruner had a gun . . ."

(T 11-20-14, 188).

For all practical purposes it seems like the State stole a page right out of the play book used by the State in *Gray*. In *Gray*: "The State ha[d] simply replaced the non-confessing defendant's name with a kind of symbol, namely the word 'deleted' or a blank space set off by commas." *Gray,* 523 US at 192. On the other hand the trial court judge – to the extent he approved the State's ineffective redaction tactic – seemed completely unaware of the United States Supreme Court's directive in *Gray* which unequivocally prohibits merely replacing a defendant's name with a blank. The United States Supreme Court in *Gray* held:

> "Bruton, as interpreted by Richardson, holds that certain 'powerfully incriminating extrajudicial statements of a co-defendant' – those naming another defendant – considered as a class, are so prejudicial that limiting instructions cannot work. Richardson, 481 US at 207; Bruton, 391 US at 135. Unless the prosecutor wishes to hold separate trials or to use separate juries or to abandon use of the confession, he must redact the confession to reduce significantly or to eliminate the special prejudice that the Bruton Court found. *Redactions that simply replace a name with an obvious blank space or a word such as 'deleted' or a symbol or other similarly obvious indications of alteration, however, leave statements that, considered as a class, so closely resemble Bruton's unredacted statements that, in our view the law must require the same result."*

Gray, 523 US at 192 (emphasis added).

> The United States Supreme Court in *Gray,* went on to explain precisely why the type of redactions which occurred in the case at bar, merely using the word "blank" – violates a defendant's constitutional right to confrontation:
>
> "For one thing, a jury will often react similarly to an unredacted confession and a confession redacted in this way, for the jury will often realize that the confession refers specifically to the defendant. This is true even when the State does not blatantly

link the defendant to the deleted name, as it did below by asking the detective whether Gray was arrested on the basis of information in Bell's confession as soon as the officer had finished reading the redacted statement. Consider a simplified but typical example, a confession that reads 'I, Bob Smith, along with Sam Jones, robbed the bank." *To replace the words 'Sam Jones' with an obvious blank will not likely fool anyone.* A juror somewhat familiar with criminal law would know immediately that the blank, in the phrase "I, Bob Smith, along with, robbed the bank," refers to defendant Jones. A juror who does not know the law and who therefore wonders to whom the blank might refer need only lift his eyes to Jones, sitting at counsel table, to find what will seem the obvious answer, at least if the juror hears the judge's instruction not to consider the confession as evidence against Jones, for that instruction will provide an obvious reason for the blank. A more sophisticated juror, wondering if the blank refers to someone else, might also wonder how, if it did, the prosecutor could argue the confession is reliable, for the prosecutor, after all, has been arguing that Jones, not someone else, helped Smith commit the crime.

For another thing, the obvious deletion may well call the jurors' attention specially to the removed name. By encouraging the jury to speculate about the reference, the redaction may overemphasize the importance of the confession's accusation-once the jurors work out the reference. That is why Judge Learned Hand, many years ago, wrote in a similar instance that blacking out the name of a co-defendant not only "would have been futile .... [T]here could not have been the slightest doubt as to whose names had been blacked out,' but 'even if there had been, that blacking out itself would have not only laid the doubt, but underscored the answer.' United States v. Delli Paoli, 229 F.2d 319, 321 (CA2 1956), aff'd, 352 U. S. 232 (1957), overruled by Bruton v. United States, 391 U. S. 123 (1968). See also Malinski v. New York, 324 U. S. 401, 430 (1945) (Rutledge, J., dissenting) (describing substitution of names in confession with "X" or "Y" and other similar redactions as "devices ... so obvious as perhaps to emphasize the identity of those they purported to conceal").

Finally, Bruton's protected statements and statements redacted to leave a blank or some other similarly obvious alteration function the same way grammatically. They are directly accusatory. Evans' statement in Bruton used a proper name to point explicitly to an accused defendant. And Bruton held that the 'powerfully incriminating' effect of what Justice Stewart called 'an out-of-court accusation,' 391 U. S., at 138 (concurring opinion),

> creates a special, and vital, need for cross-examination-a need that would be immediately obvious had the co-defendant pointed directly to the defendant in the courtroom itself. The blank space in an obviously redacted confession also points directly to the defendant, and it accuses the defendant in a manner similar to Evans' use of Bruton's name or to a testifying co-defendant's accusatory finger. By way of contrast, the factual statement at issue in Richardson-a statement about what others said in the front seat of a car-differs from directly accusatory evidence in this respect, for it does not point directly to a defendant at all."

Gray, 523 US at 193-194 (emphasis added).

In the case at bar, there is no question that Defendant-Appellant's right to confrontation was violated where the "powerfully incriminating" testimony of Westley Webb "simply replaced [Defendant-Appellant's] name with [the] obvious [word] blank." Id at 192. As the Court in *Gray* ultimately held:

> "[W]we believe that, considered as a class, redactions that replace a proper name with an obvious blank, the word "delete," a symbol, or similarly notify the jury that a name has been deleted are similar enough to Bruton's unredacted confessions as to warrant the same legal results."

Gray, 523 US at 195.

There is complete unanimity amongst the federal and state Courts on this issue. All federal Court of Appeals and all state Supreme Courts who have addressed this issue in light of *Gray* hold that "'redactions that replace a proper name with an obvious blank, the word 'delete,' a symbol, or similarly notify the jury that a name has been deleted are similar enough to Bruton's unredacted confessions as to warrant the same legal results.'" *Foxworth v St. Amand,* 570 F3d 414, 433 (1st Cir 2009) (quoting *Gray*, 523 US at 195). *See also, United States v Taylor,* 745 F3d 15, 27-28 (2d Cir 2014) ("When the confession of one defendant implicates his co-defendants, *Bruton* demands 'a redaction and substitution adequate to remove the 'overwhelming

probability' that a jury will not follow a limiting instruction that precludes its consideration of a redacted confession against a defendant other than the declarant.'"); *Wash v Sec'y Pa Dep't of Corr.,* 801 F3d 160, 167 (3rd Cir 2015) ("Here, there were two obvious alterations that notified the jury that Washington's name was deleted. It, therefore, demands the same result as in *Bruton.*"); *United States v Saralum Min,* 704 F3d 314, 320 (4th Cir 2013) ("Under *Gray,* a confession is 'facially incriminatory,' and thus inadmissible even with a limiting instruction, where the inference required to link the statement to the defendant are the type 'that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial.'")' *United States v Hickman,* 151 F3d 446, 457 (5th Cir 1998) ("The confessions admitted in this case, having been redacted by blacking out the co-defendants names with a marker, are exactly the type of evidence found unconstitutional by *Gray.* Therefore, we find that the admission of the confessions was error."); *Stanford v Parker,* 266 F3d 442, 456 (6th Cir 2001) ("Bruton violations can occur even where a defendant's name is redacted or replaced from a non-testifying co-defendant's confession . . . Although the other party is referred to as 'blank' in the redacted statement, the circumstances of the case and other evidence admitted virtually compel the inference that 'blank' is [the defendant]"); *United States v Eskridge,* 164 F3d 1042, 1044 (7th Cir 1998) ("Clearly, the use of Pointer's confession with the word 'another' in place of Eskridge's name falls within the class of statements described in *Gray* as violative of Bruton . . . The government concedes that admitting Pointer's redacted confession violated Bruton in light of *Gray* . . ."); *United States v Coleman,* 349 F3d 1077, 1085 (8th Cir 2003) ("Bruton violations may be avoided through redaction if a cautionary fury instruction is given, if the redactions are neutral, and if they do not obviously directly refer to the defendant.") *United States v Peterson,* 140 F3d 819, 822 (9th Cir 1998) ("In this case, the redaction of Peterson's name for 'person X' is

clearly impermissible under *Gray*. The co-defendant was pointing an accusatory finger at someone and it was not difficult for the jury to determine that that person was the other defendant on trial"); *United States v Rahseparian,* 231 F3d 1267, 1278 (10th Cir 2000) ("where the inculpatory inference can be made immediately in the mind of a reasonable juror the statement [is] protected by Bruton and any curative instruction insufficient."); *United States v Schwartz,* 541 F3d 1331, 1350 (11th Cir 2008) ("'the redacted confession with the blank prominent on its face, in Richardson's words 'facially incriminates' the [defendant],' . . . even without naming him."); *United States v Straker,* 800 F3d 570, 599 (DC Cir 2015) (Bruton "is violated when the inferences are so strong and obvious that a jury cannot be expected to follow limiting instructions."). All of the federal circuit Court of Appeals are on the same page that the type of redaction in this case is unconstitutional.

The state Supreme Courts that have addressed this issue in light of *Gray* would not tolerate what occurred here. The Supreme Judicial Court of Massachusetts in *Commonwealth v Bacigalupo,* 455 Mass 485; 918 NE2d 51 (2009) agreed with the defendant that a witness's testimony recounting co-defendant's confession to him shortly after the shooting incriminated defendant and violated the principle of *Bruton.* The Court held as follows:

> "Patti's reference to Carter's 'friend' suggested to the jury that Carter was referring to the defendant. This implication was strengthened by the fact that only two people were on trial for the shootings which Carter said were committed by himself and a 'friend.' Thus, the jury logically would have inferred that the 'friend' was the defendant. In addition, repeated objections by the defendant's counsel, the judge's forceful instructions that Patti's testimony did not concern the defendant, and the judge's repeated admonitions to Patti on how to respond properly to the questions (to testify only to 'what . . . Carter did, not what anybody else did') only emphasized to the jury that the 'friend' was indeed the defendant. This is particularly so given that McConnell's earlier testimony named Carter and the defendant as the two shooters at

> Club Caravan. Moreover, when Carter's attorney cross-examined Patti, Patti agreed that 'Johnny' shot at Nogueira at the Comfort Inn, and Patti had earlier referred in his testimony to the defendant as 'Johnny.' Pursuant to Gray, supra at 195, nicknames fall under the rule of Bruton as much as full names. This reference plainly incriminated the defendant."

Bacigalupo, 455 Mass at 494-495.

The case of *Bacigalupo, supra* has many similar features to the case at bar. Other State Supreme Courts agrees with the Supreme Judicial Court of Massachusetts. *See e.g., Jefferson v State*, 259 Ark 454, 470; 198 SW3d 527 (2004) ("Starr's statement, as admitted into evidence, obviously directly referred to Jefferson, an inference that the jury easily could have drawn from Jefferson's status as a co-defendant and the State's concession that Foster was the shooter. We hold that the admission of Starr's redacted statement violated Jefferson's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment."); *People v Burney,* 47 Cal 4th 203, 231-232; 212 P3d 639 (2009) ("we observe that the redacted statements of co-defendants Rembert and Burnett did not completely eliminate any reference to the 'existence' of accomplices . . . and, as the Attorney General concedes, the statements in conjunction with other evidence led to the obvious inference that defendant was 'the other' who shot Kondrath . . .. The redactions in the present case did not satisfy the standard set forth in *Gray, supra*, 523 US at pages 196-197. As explained above, when, despite redaction, a co-defendant's statement obviously refers directly to the defendant and implicates him or her in the charged crimes, the Bruton rule applies and introduction of the statement of a joint trial violates the defendant's rights under the confrontation clause."); *Davis v State,* 272 Ga 327, 331; 528 SE2d 800 (2000) (Despite the redaction: "Because Hill had no opportunity to cross-examine Davis's inculpatory statements against him, his Sixth Amendment rights were violated"); *State v White,* 275 Kan

580, 593; 67 P3d 138 (2003) ("redaction that replaces a defendant's name with an obvious indication of deletion, such as a blank space, the word 'deleted,' or a similar symbol, falls within Bruton's protective rule."); *Barth v Commonwealth,* 80 SW3d 390, 395 (2001) ("While the confession did not directly implicate P.J. by name, it was facially inculpatory as to the unnamed "other party.' As in *Gray*, *supra*, the jury needed only to make a slight, intuitive leap to infer that P.J., the confessor's co-defendant, was the 'other party' identified in the confession as the primary perpetrator of these crimes."); *State v Blanche,* 696 NW2d 351, 369 (2005) ("We disagree with the postconviction court's conclusion that Gaine's statement was so nebulous that the jury could not possibly infer that the statement meant something to the effect that Bernard and Blanche should have gotten out of the car before shouting at Scott so as to have avoided hitting Phillips"); *State v McLaughlin,* 205 NJ 185, 210 (2011) ("a non-testifying declarant's state of mind hearsay statement concerning future acts by the non-declarant/defendant properly must be redacted to omit references to the non-declarant/defendant in order to satisfy . . . the requirements of the Confrontation Clause, US Const Amend VI . . ."); *State v Fisher,* 185 Wn2d 836, 847; 374 P3d 1185 (2016) ("Marsh and Gray require that the redaction omit the existence of anyone other than the co-defendant. Applying this standard, we conclude that the use of 'the first guy' as a replacement for Trosclair's name in Fisher's statement implicates Trosclair and that the admission of fisher's statements during her joint trial with Fisher amounted to constitutional error.")

The Supreme Judicial Court of Maine in *State v Boucher,* 1998 ME 209; 718 A2d 1092 (1998) agreed with the defendant's claim that joinder of the trials violated his Sixth Amendment right to confrontation where at his joint trial his brother's admissions to the crimes, which

included details of defendant's involvement and which would be inadmissible hearsay if offered against him even if redacted, clearly implicated him in the crime. The Court held:

> "We conclude that, just as the confessions admitted in Gray, the State's questioning of Theriault-Pace and O'Leary, which elicited the fact that four individuals were involved in the break-in and proceeded to name three of the participants, clearly notified the jury that a name was being deleted from Scott Boucher's confession . . . The teaching of Gray is that even redacted confessions can sometimes "obviously refer directly to someone, often obviously the defendant, and [can] involve inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial." Gray, 118 S. Ct. at 1157. Scott's confessions, as admitted in evidence, obviously referred directly to Steven, an inference that the jury easily could have drawn simply from Steven's status as a co-defendant. We conclude that the admission of those portions of Scott's confessions that implicated Steven violated Steven's rights under the Confrontation Clause of the Sixth Amendment."

Boucher, 1998 ME 209, at p 16.

The Supreme Court of Pennsylvania in *Commonwealth v Markman,* 591 Pa 249; 916 NW2d 586 (2007) held that the trial court erred in allowing a jury to hear a redacted confession by non-testifying co-defendant in a joint trial especially where the defendant was the only other person who could have been involved:

> "The events here mirror the scenario proscribed by Gray: Appellant's name was replaced with a phrase that was an obvious (and indeed explicit) substitution, and the jury was admonished not to consider the statement as evidence against Appellant. The redactions by their nature alerted the jury to the fact of alteration, and they did 'not likely fool anyone' as to whose name had been removed-particularly as Housman and Appellant were the only two defendants in the courtroom . . . Moreover, the trial court explicitly revealed the fact of the redactions to the jurors. Accordingly, we agree with Appellant that introduction of this statement in its redacted form violated her Bruton confrontation rights for the reasons expressed in Gray."

Markman, 591 Pa at 277.

The Supreme Court of South Carolina in *State v Holder,* 382 SC 278; 676 SE2d 690 (2009) held that the admission of the co-defendant's redacted statement violated defendant's rights under the Confrontation Clause of the Sixth Amendment as the co-defendant did not testify and was not subject to cross examination:

> "We find the redaction in this case is analogous to that discussed in Gray because, despite the redaction, it was apparent that Martucci was referring to Holder, and this inference was one that could be readily made even without *286 reliance on the other testimony developed at trial. Thus, we find the admission of the redacted statement violated Holder's rights under the Confrontation Clause as Martucci did not testify and was not subject to cross-examination."

Holden, 382 SC at 285-286.

This Court too should fully embrace the spirit of *Gray* and conclude that the half-baked redaction efforts in this case of merely replacing Defendant-Appellant's name with an obvious alteration by using the word "blank," "facially incriminates" Defendant-Appellant in this joint trial and violated his right to confrontation. There is no way where the redaction were constitutionally ineffective that the limiting instruction saved the powerfully incriminating preliminary examination testimony from being considered by the jury. The limiting instruction was ineffective here too where the jury was instructed by the prosecutor during its opening statement explicitly to expect to hear from Westley Webb and specifically told to anticipate Westley Webb to place a gun in Defendant-Appellant's hands based on what Westley Webb learned from co-defendant Lawson's confession to him. The limiting instruction was insufficient where the jury was told that there were only two people involved in this murder and Defendant-Appellant and co-defendant Lawson were the only two people charged in this joint trial before a simple jury leaving them no choice but to conclude that Defendant-Appellant was "blank." The

redaction and limited instruction was also ineffective where the jury was explicitly told that the word "blank" was not someone's nickname but they were in fact referring to somebody but the word "blank" was being used because they were supposedly "trying to follow the law":

> BY MR. PRASAD:
>
> > And I want to be clear that Blank is not a nickname of someone. It's not. We're not calling someone Blank but we are trying to follow the law.

(T 12-1-14, 104).

While they may have been "*trying* to follow the law," they failed utterly to actually follow the law and that is what matters. The failure to actually follow the law by failing to eliminate any reference to Defendant-Appellant's name and his existence and the failure to avoid using obvious alterations such as the word "blank" did not comply with the law and consequently violated *Gray*. Judge Shapiro in his concurring opinion said it best:

> I do not agree with the majority's view that the trial court's instruction to the jury to consider the evidence only against defendant Lawson was curative. Some limiting instructions are effective and some are not. In this case I think it would be erroneous to conclude that the jury could ignore the significance of the statement as to Bruner because it was the only evidence that put a gun in his hand at the time of the shooting. Expecting jurors to compartmentalize the relevancy of this very significant evidence so as to apply it only to one defendant is simply unrealistic. And given that Webb's testimony had been the subject of pretrial discussion, the trial court would, in my view, have been wise to empanel two juries, as was requested, rather than risk a retrial.

People v Bruner/Lawson, supra concurring opinion of Shapiro, J., at *1.

The accusations that the crudely redacted preliminary examination testimony presents "'is more vivid than inferential incrimination, and hence more difficult to thrust out of mind.'" *Gray,* 523 US at 196 (quoting *Richardson* 481 US at 208). Being realistic in light of the

insufficiently redacted "powerfully incriminating" testimony from Westley Webb the "limiting instruction [did not] work." *Gray*, 523 US at 192. Defendant-Appellant's constitutional right to confrontation was unquestionably violated and a new trial is warranted because the jury was certainly influenced by this error.

A.

THE HARMLESS ERROR DEFENSE HAS BEEN ABANDONED BY THE STATE WHEN IT NEVER WAS PROPERLY PRESENTED IN EITHER OF THE TWO QUESTIONS PRESENTED BELOW BY THE STATE AND WHERE THE STATE CITED ABSOLTELY NO AUTHORITY ASSERTING A HARMLESS ERROR DEFENSE

This Court in *People v Carines,* 460 Mich 750, 774; 597 NW2d 130 (1999) (citing *People v Anderson (After Remand),* 446 Mich 392; 521 NW2d 538 (1994)) held that the beneficiary of a preserved constitutional error has the burden of establishing that the error was harmless beyond a reasonable doubt. *See O'Neal v McAninch,* 513 US 432, 444-445 (1995) The *O'Neal* Court treated claims of harmless errors as "affirmative defense[], for which the party in the position of defendant (here the State) bears the risk of equipoise." The United States Supreme Court in *Davis v Ayala,* 135 SCt 218 (2015) reiterated that the burden is upon the prosecution to prove that the error was harmless:

> "In the absence of 'the rare type of error' that requires automatic reversal, relief is appropriate only if the prosecution cannot demonstrate harmlessness."
>
> *Id* at 2197 (quoting *Glebe v Frost,* 574 US __, ___, 135 SCt 429; 190 LED2d 317, 320 (2014) (per curiam).

To assert a harmless error defense the State must properly plead the defense by raising the argument in the State of Questions Presented before the Court. MCR 7.212(C)(5); *People v*

Mackle, 241 Mich app 583, 604 n4; 617 NW2d 339 (2000). The State, in the case at bar, only presented two questions below and neither one addressed a harmless error defense. The state presented thusly below:

COUNTERSTATEMENT OF ISSUES PRESENTED

I.

A CO-DEFENDANT'S STATEMENTS AGAINST INTEREST CAN BE ADMITTED AGAINST THAT CO-DEFENDANT AT A JOINT TRIAL. CO-DEFENDANT LAWSON ADMITTED THAT HE HAD BEEN WITH THE SHOOTER AT A CLUB, THAT HE DROVE THE SHOOTER AROUND AND DROPPED HIM OFF NEAR THE CLUB, AND THAT HE FLED AFTER THE SHOOTING. DID THE TRIAL COURT ABUSE ITS DISCRETION BY ADMITTING LAWSON'S STATEMENT AGAINST INTEREST, ESPECIALLY SINCE IT WAS ADMITTED ONLY AS TO LAWSON, AND NOT DEFENDANT?

The trial court answered, "No"
The People answers: "No"
Defendant answers: "Yes"

II.

IDENTITY MAY BE SHOWN BY EITHER DIRECT OR CIRCUMSTANTIAL EVIDENCE. HERE, IT WAS DEFENDANT WHO GOT FORCEFULLY THROWN OUT OF THE CLUB, DEFENDANT WHO THREATENED THE SECURITY GUARDS THAT HE WOULD RETURN, DEFENDANT WHO WAS BARRED FROM RE-ENTERING THE CLUB WHEN HE REFUSED TO BE SEARCHED FOR WEAPONS, AND DEFENDANT WHO WAS SEEN CIRCLING THE CLUB IMMEDIATELY BEFORE THE SHOOTING. WAS THE CIRCUMSTANTIAL EVIDENCE SUFFICIENT TO PROVE THAT DEFENDANT WAS THE ONE WHO COMMITTED THE SHOOTING?

The trial court answered, "Yes"
The People answers: "Yes"
Defendant answers: "No"

(*See* People's Brief on Appeal, filed April 27, 2016, page 2).

There is clearly no assertion of a harmless error defense within either of the above questions presented. The United States Supreme Court in *Wood v Allen,* 558 US 290 (2010), held it will not review an argument that was not fairly included in the questions presented to the Court:

> "Wood also argues that the state-court decision involved an unreasonable application of Strickland under § 2254(d)(1) because counsel failed to make a reasonable investigation of Wood's mental deficiencies before deciding not to pursue or present such evidence. Without a reasonable investigation, Wood contends, these decisions were an unreasonable exercise of professional judgment and constituted deficient performance under Strickland. *We agree with the State, however, that this argument is not "fairly included" in the questions presented under this Court's Rule 14.1(a).* Whether the state court reasonably determined that there was a strategic decision under § 2254(d)(2) is a different question from whether the strategic decision itself was a reasonable exercise of professional judgment under Strickland or whether the application of Strickland was reasonable under § 2254(d)(1). Cf. Rice, supra, 546 U.S., at 342, 126 S.Ct. 969; 163 LEd2d 824 ("The question whether a state court errs in determining the facts is a different question from whether it errs in applying the law"). These latter two questions may be "related to the one petitione[r] presented, and perhaps complementary to the one petitione[r] presented," but they are "not fairly included therein." Yee v. Escondido, 503 U.S. 519, 537, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1999) (internal quotation marks omitted).

Wood, 558 US at 303-304 (first italics added).

In the case at bar, the State only challenged the Constitutional claim itself; the question of whether the error was harmless beyond a reasonable doubt was not properly set forth in the State's Counterstatement of Issues Presented. The issue of harmless error was not considered by the court below because it was not properly presented by the State.

While the State did cursorily discuss harmless error in the very last paragraph of the last question, no applicable authority for harmless error was cited. This, coupled with the complete lack of presenting the question within the questions presented, proves that the issue has been abandoned by the State. A party may not "'announce a position or assert an error and then leave it up to [the] Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority too either to sustain or reject his position.'" *People v Waclawski,* 286 Mich App 634, 679; 780 NW2d 321 (2009) (quoting *Mitcham v City of Detroit,* 355 Mich 182, 203; 94 NW2d 388 (1959). "'[N]or may [a party] give only cursory treatment [of an issue] with little or no citation of supporting authority.'" *People v Watson,* 245 Mich App 572, 587 (2001) (quoting *People v Kelly*, 231 Mich App 627, 640-641 (1998). Such cursory treatment constitutes abandonment of the affirmative defense.

The United States Supreme Court in *Woods, supra,* likewise agrees that merely discussing an issue throughout the paper pleadings do not properly present the issue to the Court:

> "It is true that Wood's petition discussed the Eleventh Circuit's misapplication of § 2254(d)(1) and Strickland. Pet. for Cert. 22-27. But "the fact that [petitioner] discussed this issue in the text of [his] petition for certiorari does not bring it before us. Rule 14.1(a) requires that a subsidiary question be fairly included in the question presented for our review." Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp., 510 U.S. 27, 31, n. 5, 114 S.Ct. 425, 126 L.Ed.2d 396 (1993) (per curiam). We therefore do not address Wood's argument that the state court unreasonably applied Strickland in rejecting his ineffective-assistance-of-counsel claim on the merits."

Woods, 558 US at 304.

Where the State did not properly assert the harmless error defense in its counterstatement of issues presented and completely failed to cite any authority on this point within the brief this Court should conclude that the affirmative defense of harmless error was abandoned. The Court

has consistently held that a harmless error argument is abandoned by the State for failing to properly raise the argument below. *See People v McGraw,* 484 Mich 120, 131 n 35; 771 NW2d 655 (2009) (citing *People v Oliver,* 417 Mich 366, 386 n 17; 338 NW2d 167 (1983)) (noting that it is appropriate to "fail[] to address the prosecution's harmless error argument because the prosecution failed to raise this issue below.")

In this case, the affirmative defense of harmless error is effectively abandoned.

B.

WHERE WESTLEY WEBB'S UNCONSTITUTIONALLY ADMITTED TESTIMONY WAS THE MOST POWERFUL INCULPATORY EVIDENCE AGAINST DEFENDANT-APPELLANT THE STATE CANNOT CARRY ITS BURDEN OF PROVING THAT THE CONSTITUTIONAL ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT.

Here reversal is required unless the State as the beneficiary of the error proves the error was harmless beyond a reasonable doubt. *Chapman v California,* 386 US 18, 24 (1967). To determine whether the State has met that "strict" standard, *California v Roy,* 519 US 2, 5 (1996) (per curiam), the inquiry "is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered." *Sullivan v Louisiana,* 508 US 275, 279 (1993). Rather, it involves whether "the guilty verdict actually rendered in this trial was *surely unattributable* to the error." *Ibid* (emphasis added).

In the case at bar, even the State agrees that "nobody actually saw the shooter" and that the "jury [] [had] to infer from" the "circumstantial evidence," that Defendant-Appellant was the culprit. (People's Brief on Appeal, filed April 27, 2016 in the Michigan Court of Appeals, at page 17).

The unconstitutionally admitted evidence from Westley Webb's powerfully incriminating testimony was the only evidence presented that put a gun in Defendant-Appellant's hands. The actual shooter was not identified by any witness. None of the fifteen witnesses who testified during the trial ever saw Defendant-Appellant in possession of a gun. The uncross-examined powerfully incriminating testimony from Westley Webb unquestionably "swayed the jury." *People v Banks,* 438 Mich 408, 430; 475 NW2d 769 (1991).

Whether a *Bruton/Gray* error of this magnitude is harmless in a particular case depends upon a host of facts, all readily accessible to the reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. *Cf Harrington v California,* 395 US 250, 254 (1969); *Schneble v Florida,* 405 US 427, 432 (1972); *Delaware v Van Arsdall,* 475 US 673, 684 (1986).

In this case, Westley Webb's testimony was extremely important to the prosecution's case. He was the only one to connect Defendant-Appellant to a gun on the night in question. Without being connected to a gun the State's already weak case would have been paralyzed. Any reasonable juror would be hard-pressed to find him or herself convinced beyond a reasonable doubt that Defendant-Appellant was involved in a murder and assault involving a gun if they would have never heard Westley Webb's testimony placing a gun in Defendant-Appellant's hands. There was absolutely no cumulative evidence on this point. There was absolutely no prior opportunity to cross-examine Westley Webb. Finally, the State's case was far from overwhelming. No reasonable jurist can conclude that the admission of Westley

Webb's powerfully incriminating testimony is harmless beyond a reasonable doubt. *Banks,* 438 Mich at 431 ("Under these circumstances, we conclude that the error in admitting the co-defendant's statements was not harmless.")

Reversal is required.

RELIEF REQUESTED

WHEREFORE, for the foregoing reasons, Defendant-Appellant prays that this Honorable Court GRANT the application for leave to appeal and REVERSE and REMAND for a new trial.

LAW OFFICES OF DAVID L. MOFFITT
& ASSOCIATES

/s/ David L. Moffitt
By: _____
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